IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON COUNTS 6 & 10 OF THE SECOND AMENDED COMPLAINT AND INTEGRATED BRIEF IN SUPPORT [DKT. NO. 2055]

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Joint Motion for Summary Judgment on Counts 6 & 10 of the Second Amended Complaint [DKT #2055]" be denied in its entirety.

I. Introductory Statement

Defendants' Motion raises three attacks on Counts 6 (trespass) and 7 (unjust enrichment / restitution / disgorgement). Each of these attacks fails. ***First,*** Defendants' attack on the State's trespass claim (Count 6) fails because the State has the requisite possessory property interest in that "[w]ater running in a definite stream, formed by nature over or under the surface" in the Oklahoma portion of the IRW to support its claim.[1] ***Second,*** Defendants' attack on the State's unjust enrichment / restitution / disgorgement claim fails because Defendants have unjustly avoided the cost of proper waste disposal, and (although not necessary for unjust enrichment) the State has incurred costs caused by Defendants' unjust conduct. And ***third,*** Defendants' argument that the land disposal of poultry waste which has caused the trespass to Oklahoma's natural resources and an unjust enrichment to Defendants is neither authorized under Oklahoma law,[2]

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[1] Significantly, in this Motion Defendants do not deny their poultry waste, or constituents of their poultry waste, physically invade the waters of the Oklahoma portion of the IRW.

[2] In an effort to argue that Arkansas law applies to conduct occurring in Arkansas and causing injury in Oklahoma, Defendants attempt to revive an argument that this Court has already rejected. *See* Motion, p. 1, fn. 1. Specifically, Defendants assert that *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), mandates that Arkansas law applies to conduct occurring in Arkansas and causing injury in Oklahoma. *Ouellette*, however, was a Clean Water Act point source pollution preemption case, while the instant case is non-point source pollution case. Therefore, the *Ouellette* preemption principles are not in play. *See, e.g., American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001); *Defenders of Wildlife v. EPA*, 415 F.3d 1121 (10th Cir. 2005); *see also* DKT #129. In fact, that is precisely what this Court ruled when Defendants made this argument two years ago. *See* 6/15/07 Hrg. Tr., p. 16 ("[W]ith respect to Clean Water Act, I can't conclude at this time that Congress left no room for supplementary state regulation of nonpoint source pollution, so the motion will be denied at this time"). Moreover, this Court denied Defendants' motion that the commerce clause or sovereignty precluded the State's Oklahoma common law claims for conduct in occurring in Arkansas -- an argument that

nor consented to by Oklahoma. (Arkansas of course cannot consent on behalf of Oklahoma to a trespass to Oklahoma's natural resources). Therefore, Defendants' Motion should be denied in its entirety.

II. Disputed Material Facts

1. Not disputed.

2. Disputed. For purposes of its claims in this lawsuit, the State has alleged (and indeed has) a specific possessory property interest in the water in that portion of the IRW located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface, and that Defendants' conduct has resulted in an actual and physical invasion of and interference with that interest. *See* SAC, ¶ 119. The State holds title to all water in flowing streams in the Oklahoma portion of the IRW. *See* 60 Okla. Stat. § 60 Ex. 1 (Ford Dep., pp. 156-58).

Defendants improperly renew here. *See* 6/15/07 Hrg. Tr., pp. 16-17; *see also* DKT #129. Thus, as the Court recognized, the issue is one of choice-of-law. *See* 6/15/07 Hrg. Tr., p. 16. In their Motion, Defendants have plainly not properly raised the choice-of-law issue and have presented no evidence, as is their burden on a summary judgment motion, that under the applicable choice-of-law principles -- the most significant relationship test, *see Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 619-620 (10th Cir. 1998) *citing Beard v. Viene*, 826 P.2d 990, 995 (Okla. 1999); *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974) -- Arkansas law should apply. In fact, choice of law plainly points to the application of Oklahoma common law, or if Oklahoma common law does not apply, federal common law -- to conduct occurring in Arkansas and causing injury in Oklahoma. *See, e.g., Beard*, 826 P.2d at 996 ("we can think of no greater 'significant contact' than where a state or its political subdivision" is involved in a case); *Young v. Masci*, 289 U.S. 253, 258-59 (1933) ("The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it"); *Cameron v. Vandegriff*, 13 S.W. 1092, 1093 (Ark. 1890) ("The rock which occasioned the injury was put in motion by the appellants in the Indian Territory; but, by the same force, its motion was continued, and the injury done in this state. The cause of action arose here").

3. Disputed.[3] Poultry waste is not well-balanced in nutrients and is not a good fertilizer or soil conditioner. *See* Ex. 2 (Johnson P.I. Test., pp. 489-91); Ex. 3 (Johnson Rpt., ¶ 6(c)). Moreover, land applied poultry waste is not incorporated into the soil by tilling, so it can run off more easily. *See* Ex. 4 (Fisher Dep., pp. 156-57); Ex. 5 (Daniel Dep., p. 27).

4. Disputed. Poultry waste is not an effective fertilizer or soil conditioner. *See* Ex. 2 (Johnson P.I. Test., pp. 489-91). While the State regulates poultry waste application, it does not encourage, permit or approve the land application of poultry waste in the IRW. *See* Okla. Admin. Code § 785:45-5-29 & 2 Okla. Stat. § 10-9.1, *et seq.*; Ex. 6 (Gunter Dep., pp. 175-81); Ex. 7 (Parrish 1/14/08 Dep., pp. 140 & 152-53); Ex. 8 (Strong Dep., pp. 211, 220 & 245). The State created a program to move poultry waste from areas where it created environmental concerns. *See* Defs.' Ex. 10; Ex. 9 (Tolbert P.I .Test., p. 91). Moreover, the State requires that poultry waste not create an environmental or public health hazard, not result in contamination of waters of the State, and not run off from land application sites. *See* 2 Okla. Stat. § 10-9.7.

5. Disputed. Arkansas recognizes that land application of poultry waste poses serious dangers to the environment. *See* Ark. Code § 15-20-902(3); Ark. Code § 15-20-1102(1)-(3); Ark. Code § 15-20-1103(12); Ark. Code § 15-20-1104(a)(1).

6. Disputed. While it does regulate the land application of poultry waste within Oklahoma, the State of Oklahoma does not issue permits or authorizations for the land application of poultry waste. *See* 2 Okla. Stat. § 10-9, *et seq.*; 35 Okla. Admin. Code § 35:17-5-1, *et seq.*; *see also* Ex. 6 (Gunter Dep., pp. 175-81) (testifying that an animal waste management plan is a *guidance* document and compliance with such a plan does not necessarily

[3] Defendants have attached an excerpt of Dr. Clay's unsworn expert report in support of this proposition. Unsworn expert reports are not admissible to support or oppose summary judgment. *See Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1463 (D. Colo. 1997). This report, and all other unsworn reports Defendants cite, should not be considered.

equate to compliance with the law); Ex. 7 (Parrish 1/14/08 Dep., pp. 140 & 152-53) (same); Ex. 10 (Tolbert Dep., p. 222) (". . . I think there's no permit that's issued in the poultry context. So I don't know that you could say [land application of poultry waste in the IRW] is somehow expressly allowed."); Ex. 8 (Strong Dep., pp. 211 & 220) (agreeing that a farmer can get a nutrient management plan and comply with that nutrient management plan and still be violating the law because there can be site-specific runoff from his application of poultry waste); Ex.8 (Strong Dep., p. 245) (testifying that he does not believe that an animal waste management plan is a permission to apply a certain amount of phosphorus into the environment within the State of Oklahoma); Ex.11 (Littlefield Dep., p 107). Animal Waste Management Plans are not issued by the State or approved by the State. *Cf.* 2 Okla. Stat. § 10-9.7(C) (simply requiring that poultry feeding operations have an AWMP). AWMPs are written for the NRCS and the poultry grower. *See* Ex. 6 (Gunter Dep., pp. 82-83). While persons under contract with the ODAFF do write some of the AWMPs pursuant to a federal grant, they are not being written by ODAFF, but rather "as though [ODAFF] were an NRCS field office." *See* Ex. 6 (Gunter Dep., 81:11-82:16); Ex. 7 (Parrish Dep., pp. 64-66); *see also* Ex. 6 (Gunter Dep., pp. 243-244). Moreover, nothing in Oklahoma or Arkansas law *requires* land application of poultry waste.

7. Disputed. The State does not issue or approve nutrient management plans (NMPs) or animal waste management plans (AWMPs). *Cf.* 2 Okla. Stat. § 10-9.7(C) (simply requiring that poultry feeding operations have an AWMP). *See also* Ex. 6 (Gunter Dep., pp. 81-83 & 243-44); Ex. 7 (Parrish 1/14/09 Dep., pp. 64-66). Moreover, NMPs and AWMPs are not authorizations or permits to apply poultry waste on any particular field, in any particular method, at any particular time, or in any particular amount. *See* Resp. to Facts, ¶ 6. All land application of poultry waste in Oklahoma must be done in a manner that ensures no runoff and that does not

create an environmental or a public health hazard and does not result in the contamination of waters of the State. *See* 2 Okla. Stat. § 10-9.7.

8. Disputed. The testimony cited does not stand for the proposition that poultry waste is or has been applied consistent with Oklahoma and Arkansas law. Rather this testimony is simply a collection of deposition snippets from witnesses (most of whom have no regulatory oversight responsibilities) who *are not aware* of violations of law -- a far different proposition than testimony that Defendants and their contract growers are acting in compliance with the law. *See, e.g.*, Ex. 6 (Parrish 1/14/08 Dep., pp. 14, 19, 199 & 258) (repeatedly testifying that ODAFF does not have the resources to know if there are violations of the Poultry Feeding Act). In any event, Defendants do not begin to meet their burden of proving that the approximately 345,000 tons of waste generated annually are all disposed of in compliance with law. Defendants have no idea the circumstances under which poultry waste from their birds is land applied in the IRW. *See* Ex. 12 (at resp. #1 & #2); Ex. 13 (Storm Cal-Maine 30(b)(6) Dep., p. 221); Ex. 14 (at resp. #1 & #2); Ex. 15 (at resp. #1 & #2); Ex. 16 (at resp. #6); Ex. 17 (Maupin Cargill 30(b)(6) Dep., p. 230); Ex. 18 (Alsup Cargill 30(b)(6) Dep., p. 84); Ex. 19 (at resp. #1). Finally, the fact of the matter is that poultry waste is running off and polluting the waters of the State -- *per se* evidence that poultry waste is not being applied consistent with Oklahoma law. *See* 2 Okla. Stat. § 10-9.7; Ex. 20 (Water Quality in Oklahoma -- 2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16). *See also,* Resp. to Fact ¶ 6; State's Motion for Partial Summary Judgment, DKT. # 2062; State's Response to Defendants Partial Motion for Summary Judgment on RCRA, DKT. # 2125.

9. Disputed. The exhibits cited do not support the proposition stated. The exhibits cited pertain to damages and cost estimates for remedial alternatives, which are not the remedies

being sought under the State's unjust enrichment claim. The State has indeed identified evidence of Defendants' unjust enrichment -- the costs Defendants have avoided in (1) properly managing and disposing of poultry waste, *see* Ex. 21 (Taylor Dep. pp. 142-44, 177 & Dep. Ex. 2, Table 5), and (2) responding to the releases and threatened release of this poultry waste and its constituents into the environment, totaling approximately $3.8 million. *See, e.g.*, Ex. 22, Smithee 4/16/09 Dep. pp. 23-24, 60-61, 65, 103-04; ($188,319.00 OWRB costs), and Dep. Ex. 4 ($14,469.29 ODEQ costs); Ex. 23, Phillips 4/15/09 Dep. pp. 14, 23, 30, 33, 42-43, 48, 50-51, 53-55, 58-59, 62-63, 72, 90, 91, 92, 104, 106, 109 and Dep. Ex. 2 ,OCC Resp Costs 00001-2 ($2,963,321.78); Ex. 24, Parrish 4/15/09 Dep. pp. 30-31 and Dep. Ex. 2, ODAFF Resp. Costs 00001 ($720,351).

10. Disputed. *See* Resp. to Facts, ¶ 9. Further, it is irrelevant to the State's claim of unjust enrichment.

11. Disputed. *See* Resp. to Facts, ¶ 9.

12. Disputed. *See* Resp. to Facts, ¶ 9.

13. Admitted, except to the extent it is based on Defendants' Facts ¶¶ 14-26, for which the State incorporates its Resps. to Facts ¶¶ 14-26. Defendants have avoided the costs of (1) properly managing and disposing of poultry waste, and (2) responding to the releases and threatened release of this poultry waste and its constituents into the environment -- costs that in equity and good conscience they should have borne -- and therefore Defendants have been unjustly enriched.

14. Disputed. Defendants' contract growers are not independent. Defendants exercise control over their contract growers and all essential aspects of poultry production. *See* Ex. 25 (Taylor P.I. Test., pp. 929-35, 940-44); Ex. 26 (2001 Atty. Gen. Op. 17, ¶ 11). Without limitation, Defendants own the birds, *see* DKT #1236 (at ¶ 37); DKT #1237 (at ¶ 37); DKT

#1238 (at ¶ 37) ("usually retain title"); DKT #1239 (at ¶ 37); DKT #1241 (at ¶ 37); DKT #1243 (at ¶ 37); own and supply the feed the birds eat, *see* Ex. 13 (Storm Dep., pp. 47-48); Ex. 27 (McClure Dep., pp. 135-36); Ex. 17 (Maupin Dep., pp. 142-43); Ex. 28 (Butler Dep., p. 16); Ex. 29 (Houtchens Dep., pp. 147-48); Ex. 30 (Murphy Dep., p. 141); Ex. 31 (Pilkington Dep., pp. 49-50); Ex. 32 (Schaffer Dep., p. 14); decide when the birds are delivered, *see* Ex. 33 (Dicks Dep., p. 116); Ex. 27 (McClure Dep., p. 134); Ex. 34 (Schwabe Dep., p. 47); Ex. 35 (Wear Dep., pp. 26-27); Ex. 30 (Murphy Dep., pp. 140-41); Ex. 31 (Pilkington Dep., p. 49); decide the number of birds delivered, *see* Ex. 33 (Dicks Dep., p. 116); Ex. 18 (Alsup Dep., p. 261); Ex. 35 (Wear Dep., p. 26); regularly inspect and supervise the growing operations,, *see* Ex. 33 (Dicks Dep., pp. 118-9); Ex. 13 (Storm Dep., pp. 60-61); Ex. 18 (Alsup Dep., pp. 29-31 & 35); Ex. 17 (Maupin Dep., pp. 150-52); Ex. 27 (McClure Dep., pp. 136-140); Ex. 28 (Butler Dep., pp 21-22); Ex. 36 (Mullikin Dep., pp. 46-48); Ex. 30 (Murphy Dep., pp. 132 & 142); Ex. 37 (Reed Dep., pp. 50-52); Ex. 31 (Pilkington Dep., p. 50); Ex. 38 (Pigeon Dep., pp. 65-68); dictate where growing operations are located, *see* Ex. 33 (Dicks Dep., p. 115); Ex. 18 (Alsup Dep., p. 58); Ex. 27 (McClure Dep., p. 176); Ex. 29 (Houtchens Dep., p. 30); Ex. 30 (Murphy Dep., p. 171); Ex. 39 (Tyson website); and specify poultry house clean-outs / cake-outs, *see* Ex. 18 (Alsup Dep., pp. 45-48, 52-53); Ex. 28 (Butler Dep., p. 25); Ex. 40 (Williams Dep., 14-15); Ex. 38 (Pigeon Dep., p. 75); Ex. 30 (Murphy Dep., p. 199); Ex. 41 (at TSN0039CORP); Ex. 42 (at TSN0138CORP); Ex. 43 (at TSN0273CORP); Ex. 44 (at PFIRWP-000604) [to be filed under seal]; Ex. 45 (at CARTP000391-392) [to be filed under seal]; Ex. 46 (at GE-HB 0024); Ex. 47 (collective exhibit of George's, Tyson, Peterson & Simmons flock service reports specifying clean outs / cake outs). The flock-to-flock structure of the contracts with the growers underscore the control Defendants have, as Defendants can simply decline to deliver new birds to a grower. *See* Ex. 25 (Taylor P.I.

Test., pp. 933-35). Defendants' contracts with the growers are generally non-negotiable. *See* Ex. 25 (Taylor P.I. Test., p. 940); Ex. 13 (Storm Dep., p. 55); Ex. 17 (Maupin Dep., p. 21); Ex. 40 (Williams Dep., p. 14); Ex. 27 (McClure Dep., p. 133); Ex. 35 (Wear Dep., pp. 39 & 56); Ex. 30 (Murphy Dep., p. 230); Ex. 31 (Pilkington Dep., p. 21). In short, Defendants have oligopsony power over the growers. *See* Ex. 25 (Taylor P.I. Test., pp. 941-43); Ex. 21 (Taylor Dep., p. 29). Defendants' contracts with their growers, with the exception of Defendant Peterson's contracts since 1999 and Simmons' contracts since 2008, do not transfer ownership of the poultry waste to the growers. *See* Ex. 25 (Taylor P.I. Test., p. 938); Ex. 21 (Taylor Dep., pp. 132-34); Ex. 48 (Taylor Aff., ¶ 15); Defs.' MSJ Exs. 5 & 6. However, as noted above, Defendant Peterson's and Defendant Simmons' contracts with their growers are non-negotiable, even as to responsibility for poultry waste. *See, e.g.*, Ex. 35 (Wear Dep., pp. 39 & 56-57); Ex. 21 (Taylor Dep., p. 55-56). And, as demonstrated by the *City of Tulsa* settlement, Defendants have the ability to control the growers and the disposal of the poultry waste. *See* Ex. 9 (Tolbert P.I. Test., pp. 94-95); Ex. 49 (at pp. 8-9).

15. Disputed. Poultry at Defendants' own operations in the IRW are raised in houses with equipment owned by those Defendants. *See, e.g.*, Ex. 50 (Patrick Dep., pp. 36-38).

16. Disputed. Some Defendants provide the bedding material used by their contract growers. *See, e.g.*, Defs.' MSJ Ex. 35 (at TSN59500SOK); Defs.' MSJ Ex. 40 (at CARTP172228).

17. Disputed. Poultry litter, also known as poultry waste, consists of poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation. *See* 2 Okla. Stat. § 10-9.1(B)(21). Poultry waste contains large amounts of phosphorus. *See* Ex. 51 (at p. 3); Ex. 52 (at PIGEON.0643). It also

contains the bacteria *E. coli*, *Salmonella* and *Campylobacter*. *See* Ex. 53 (Teaf P.I. Test., pp. 205 & 207); Ex. 54 (Lawrence P.I. Test., pp. 1169-70); Ex. 55 (Harwood P.I. Test., p. 642).

18. Disputed. Defendants specify clean-outs and cake-outs of the poultry houses. *See* Resp. to Facts, ¶ 14.

19. Disputed. Defendants' contracts with their growers, with the exception of Defendant Peterson's contracts since 1999 and Simmons' contracts since 2008, do not transfer ownership of the poultry waste to the growers. *See* Resp. to Facts, ¶ 14. With respect to Defendants Peterson and Simmons, their contracts with their growers are non-negotiable, even as to responsibility for poultry waste. *See id*. Finally, neither the affidavits nor testimony cited (with the exception of that of Mr. Robinson) state that the contract growers own the poultry waste.

20. Disputed. Defendants' contracts generally do not transfer ownership of poultry waste to their contract growers. *See* Resp. to Facts, ¶ 19. Further, as demonstrated by the *City of Tulsa* settlement, Defendants have the ability to control the growers and the disposal of the poultry waste. *See* Ex. 9 (Tolbert P.I. Test., pp. 94-95); Ex. 49 (at pp. 8-9). Knowing full well that poultry waste necessarily follows from the growing of poultry, that their birds generate an enormous amount of poultry waste, *see* Ex. 56 (Engel Aff., ¶¶ 6-11), and that poultry waste has no further use in the poultry growing process, *see* Ex. 2 (Johnson P.I. Test., p. 476); Ex. 25 (Taylor P.I. Test., 944-45); Ex. 57 (Littlefield P.I. Test., p. 2018); Ex. 5 (Daniel Dep., p. 49), Defendants, rather than properly managing it themselves, simply leave this waste behind for the contract growers to dispose of by land application, *see* Ex. 33 (Dicks Dep., p.194); Ex. 65 (Chaubey Dep., pp. 32-33); Ex. 58 (Ryan P.I. Opening., p. 46); on land that is highly susceptible to pollution from such land-applied waste. *See* Ex. 59 (Fisher Aff. 1, ¶ 6); Ex. 60 (Fisher Aff. 2,

¶¶ 7-27). Moreover, Defendants' conduct influences the timing, location and amount of poultry waste that is land applied in the IRW. Defendants dictate where the growing operations are located, *see* Resp. to Facts, ¶ 14, thus influencing where poultry waste is disposed of through land application. *See also* Ex. 61 (Engel P.I. Test., pp. 446-67); Ex. 59 (Fisher Aff. 1, ¶ 5). Defendants decide when the birds are delivered, *see* Resp. to Facts, ¶ 14, and specify clean-outs and cake-outs of the poultry houses, *see* Resp. to Facts, ¶¶ 14 & 18, thus influencing when poultry waste is disposed of through land application. *See also* Ex. 62 (Fisher P.I. Test., p. 416). And Defendants have concentrated poultry growing operations in the IRW, *see* Ex. 63 (Fisher Aff. 3, ¶ 3), and decide the number of birds delivered to those operations, *see, e.g.*, Ex. 33 (Dicks Dep., p. 116); Ex. 18 (Alsup Dep., p. 261); Ex. 35 (Wear Dep., p. 26), thus influencing the amount of poultry waste generated that is disposed of by land application in the IRW. *See also*, Resp. to Facts, ¶ 14.

21. Not disputed.

22. Disputed. Defendants' statement is vague as it does not define what "poultry litter laws" it is speaking about. In addition to federal law, poultry waste is subject to state statutory and common law. The laws in Oklahoma are directed to persons or entities who participate in poultry growing operations. Ex. 7 (Parrish 1/14/08 Dep. pp. 24-26). Oklahoma law (and to the extent applicable under a choice of law analysis, Arkansas law) does regulate Defendants' conduct by virtue of (1) Defendants' conduct at their own operations, *see* Resp. to Facts, ¶ 15; (2) Defendants' control over their contract growers such that those growers are their agents / employees, *see* Resp. to Facts, ¶ 14; Ex. 7 (Parrish 1/14/08 Dep. pp. 33-35); Ex. 25 (Taylor P.I. Test. pp. 929-35, 940-44); and (3) the fact that a nuisance and trespass is the foreseeable result of

Defendants' contracts with their growers. *See* Resp. to Facts, ¶¶ 2, 3, 4, 5, 8, 14, & 20; Restatement (Second) Torts, § 427B.

23. Disputed. *See* Resp. to Fact, ¶ 22.

24. Disputed. Defendants' statement is vague as it does not define what "poultry litter laws and regulations" it is speaking about. In addition to federal law, poultry waste is subject to state statutory and common law. Oklahoma law (and to the extent applicable under a choice of law analysis, Arkansas law) does regulate Defendants' conduct for the reasons set forth in Resp. to Facts, ¶ 2. With respect to poultry waste, Oklahoma law obligates Defendants, without limitation, not to cause or threaten to cause pollution or contamination, not to cause or threaten to cause a nuisance, not to cause a trespass and not to land apply poultry waste where it runs off or creates an environmental or public health hazard. *See* Law identified in SAC causes of action Nos. 4, 6, 7, 8 & 10; *see* 2 Okla. Stat. § 10-9.7; Resp. to Facts, ¶ 2, 3, 4, 5, 8, 14, & 20, 22 & 23.

25. Disputed. *See* Resp. to Facts, ¶¶ 14, 18, 19 & 20.

26. Disputed, *See,* Resp. to Facts, ¶¶ 14 & 25, *See e.g.*, Ex. 64, (Cobb-Vantress contract ¶ 3, "Producer shall dispose of such (litter) in accordance with the Company's specifications," (TSN60290SOK, ¶ 8; TSN60278SOK, ¶8); and ¶ 8, "[Producer agrees] to remover all litter . . . after completion of bird cycle"). (TSN60373SOK ¶ 8).Defendants also have financial control over litter disposition in that the integrator may withhold delivery of birds when litter is stacked outside or not spread or removed. *See* Resp to Facts, ¶ 14; Ex. 66 Cobb-Vantress, Inc. GP Hen Contract (TSN60289SOK-TSN60294SOK, ¶¶ 8 & 19).

III. The Summary Judgment Standard

The summary judgment standard is well-established, and is set forth in *Lumpkin v. United States Recovery Systems*, 2009 U.S. Dist. LEXIS 7578, *2-3 (N.D. Okla. Feb. 3, 2009).

IV. Argument and Authorities

A. The State has the requisite possessory property interest in the waters that have been trespassed upon to prosecute its trespass claim

A claim for trespass "involves an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession." *Bennett v. Fuller*, 2008 U.S. Dist. LEXIS 58198, *16 (N.D. Okla. July 31, 2008). Here, the State's claim for trespass is based upon its possessory property interest in waters flowing in definite streams in the Oklahoma portion of the IRW. *See* SAC, ¶ 119. By statute, the State owns "water running in a definite stream, formed by nature over or under the surface." *See* 60 Okla. Stat. § 60(A). Such water is "public water and is subject to appropriation for the benefit and welfare of the people of the state." *See id.* The term "water running in a definite stream" includes lakes. *Depuy v. OWRB*, 611 P.2d 228, 231-32 (Okla. 1980). It remains state owned unless and until it is actually appropriated and beneficially used by another. *See, e.g., City of Stillwater v. OWRB*, 524 P.23d 938, 144 (Okla. App. 1974); *OWRB v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 753 (Okla. 1969). This Court impliedly recognized these interests in denying Defendants' motion to dismiss the trespass claim of the SAC.[4] *See* DKT #1439 (Jan. 7, 2008 Order). Thus, there can be no good faith dispute that the State's ownership interest in the waters is a sufficient interest to allow the State's trespass claim to proceed.

Defendants next attempt to improperly relitigate another argument that the Court impliedly rejected in denying Defendants' motion to dismiss the trespass claims of the SAC, *see*

[4] As the Court is well-aware, Defendants subsequently brought a Rule 19 motion asserting that these waters are owned by the Cherokee Nation. *See* DKT #1788 & DKT #1790. Even accepting arguendo Defendants' assertion -- which, of course, the State contests and convincingly rebutted in its opposition, *see* DKT #1822 -- it is of no moment as, for purposes of this lawsuit, the Cherokee Nation has assigned to the State whatever claims it may have against Defendants for pollution of the IRW from poultry waste. *See* DKT #2108.

DKT #1439 (Jan. 7, 2008 Order) -- namely whether the public water owned by the State can be a proper subject of a trespass claim. Clearly it can and is.

First, Defendants are incorrect in their assertion that the State does not in fact maintain "actual and exclusive" possession of the waters at issue. *See* Motion, p. 11. As a matter of Oklahoma law and as demonstrated above, the State's ownership of the water is in fact actual and exclusive. *See, e.g., City of Stillwater*, 524 P.2d at 944 ("[T]he state as original owner *still owns the water and will continue to do so until* it transfers it to some other person or entity") (emphasis added); *Central Oklahoma Master Conservancy District*, 464 P.2d at 753 ("The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes").[5]

Second, in any event, Defendants plainly misapprehend and overstate the meaning of "exclusive" in the context of trespass law. A possessory property interest need not be "exclusive" to support a trespass claim. Instead, a trespass claim may be brought by a person with a possessory interest against anyone with any inferior possessory property right (or no possessory property right at all). *See Cooperative Refinery Association v. Young*, 393 P.2d 537, 540 (Okla. 1964); *Lambert v. Rainbolt*, 250 P.2d 459, 461 (Okla. 1952). Stated another way, any so-called "exclusivity" must merely be as to persons with no possessory interest or a lesser possessory interest in the property. The State's interests in the water are most assuredly superior to and exclusive as to Defendants and their pollution causing activity.[6]

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[5] Notably, "[b]oth riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse." *People v. Shirokow*, 605 P.2d 859, 864 (Cal. 1980). Moreover, "[a]n appropriation is not complete until the water is put to beneficial use." Dan Turlock, Law of Water Rights and Resources, § 5:49.

[6] Prohibitions against pollution of State waters -- which of course includes water running in definite streams, formed by nature, over or under the surface -- are found in the Oklahoma Code. *See, e.g.*, 27A Okla. Stat. § 2-6-105(A) & 82 Okla. Stat. § 1084.1.

Third, Defendants' reliance on *New Mexico v. General Elec. Co.*, 335 F. Supp. 2d 1185 (D.N.M. 2004), is unavailing for a number of reasons. First, *New Mexico* was decided as a matter of New Mexico law, not Oklahoma law. Second, the district court dismissed New Mexico's claim for trespass as to the South Valley aquifer (and the Tenth Circuit Court of Appeals affirmed such dismissal) because, as the court found, New Mexico "has no possessory interest in the sand, gravel, and other minerals that make up the aquifer." *See New Mexico*, 467 F.3d at 1248 n. 36. The district court further found that New Mexico did not have a usufructuary interest in groundwater sufficient to show injury to property. *See New Mexico*, 335 F.Supp.2d at 1234, 1240. Here, however, as discussed above, under Oklahoma law the State has far more -- it has a possessory property interest (through its ownership) in the water running in definite streams in the IRW within the boundaries of the State. *See City of Stillwater*, 524 P.2d at 944 (such "public water" is "state owned").[7] And third, *New Mexico* was a groundwater case. For purposes of its trespass claim in this action, the State is not claiming an interest in groundwater not flowing in a definite stream.[8]

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[7] Defendants disingenuously claim that the State cannot bring a trespass action for injury to its own property, because the State has correctly claimed doing so in this case is an action vindicating public rights, as opposed to individual and private rights for purposes of the statute of limitations. *See* Motion, p. 11 referring to DKT. # 1917 at p. 15. It is in the public interest for the State to seek compensation for injury to its property which is used by large numbers of people, whether water in the river or the Capitol building itself. The State is not powerless before water pollution, vandalism, or destruction of its property and may recover for such damage. *See State ex rel. Nesbitt v. Apco Oil Corp.*, 569 P.2d 434, 436 (Okla. 1977) (State has capacity to sue to vindicate its property rights).

[8] Defendants' reliance on *Mathes v. Century Alumina Co.*, 2008 U.S. Dist. LEXIS 90087 (D.V.I. Oct. 31, 2008), is likewise unavailing. *Mathes* was decided as a matter of Virgin Island's law. *Id.* at *28. Moreover, unlike here where the State's trespass claim is being brought on the basis of an ownership interest, in *Mathes* the trespass claim was being brought on the basis of a *public trust* interest. *See id.* at *35 ("Because guardianship of the public trust does not rise to the level of possession necessary to maintain an action in trespass, the trespass claim is dismissed").

Boiled down to its essence, Defendants' argument is that a sovereign whose property interests are injured has fewer rights to redress than an individual whose property interests are injured. As aptly reasoned by the California Court of Appeals in the context of a public nuisance claim, there is no logic to this argument:

> [I]f a governmental property owner cannot pursue the tortfeasor for damages to its property interests, the governmental entity suffers under a disadvantage felt by no other property owner -- it cannot recover for any injury to its property interest when another maintains a public nuisance. No public interest would be served by such a limitation; it merely would relieve a tortfeasor of some of the consequences of his tortious behavior where the property injuriously affected happened to be owned by a public entity. We do not think this is a logical interpretation of the law. Where a public entity can show it has a property interest injuriously affected by the nuisance, then, like any other such property holder, it should be able to pursue the full panoply of tort remedies available to private persons.

Selma Pressure Treating Co. v. Osmose Wood Preserving, 221 Cal. App. 3d 1601, 1616 (Cal. App. 5th Dist. 1990). The logic is no different for a trespass claim. In fact, it has been long established that a sovereign may sue in trespass for injury to its own property. *See Cotton v. United States*, 52 U.S. 229, 231 (1851) (United States have the same right as any other proprietor to sue for trespasses on the public lands).

In sum, by virtue of its ownership interest, the State has a sufficient possessory property right in the water running in definite streams in the Illinois River Watershed within the boundaries of Oklahoma to support its trespass claim. Summary judgment must be denied.

B. The State has not consented to the trespass-causing activity; nor is the trespass-causing activity authorized by law

Without ever actually identifying the specific provisions of Oklahoma law that purportedly support their assertion that the State approves and permits specific instances of land application of poultry (because there are none), Defendants in this Motion continue to incorrectly argue that the State consents to and authorizes Defendants' pollution-causing conduct. Because

its entire underlying premise -- namely, that the State approves and permits specific instances of land application of poultry -- is false, Defendants' argument fails.

The facts are these. As a result of a concern over the serious environmental impacts of industrial poultry production, the State regulates the land application of poultry waste through the Oklahoma Registered Poultry Feeding Operations Act ("Poultry Feeding Act"). *See* 2 Okla. Stat. § 10-9.1, *et seq.*; *see also, e.g.*, Drew L. Kershen, *The Risks of Going Non-GMO*, 53 Okla. L. Rev. 631, 652 fn. 19 (noting that "Oklahoma was the first state to pass an environmental statute that specifically focused on the poultry industry as a source of pollution"). The centerpiece of the Poultry Feeding Act is requirements that (1) there be no runoff from land applied poultry waste, *see* 2 Okla. Stat. § 10-9.7(C)(6)(c) ("Discharge or runoff of waste from the application site is prohibited"), and (2) that land-applied poultry waste not pollute the water or create and environmental or health hazard, *see* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (b) ("Poultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state").

As guidance in meeting these requirements, a poultry feeding operation is required to have an Animal Waste Management Plan ("AWMP"). *See* 2 Okla. Stat. § 10-9.7(C). An AWMP is "a written plan that includes a combination of conservation and management practices *designed* to protect the natural resources of the state . . . ." *See* 2 Okla. Stat. § 10-9.1(B)(1) (emphasis added). Such conservation and management practices are all subject to the overarching requirement that in *any* application of poultry waste "[d]ischarge or runoff of waste from the application site is prohibited." *See* 2 Okla. Stat. § 10-9.7(C)(6)(c).

An animal waste management plan is *not* a permit or authorization to land apply poultry waste at any particular location, in any particular amount, or at any particular time. (Nor is it a

permit or authorization to land apply poultry waste generally, or a requirement to do so). Rather, it is simply a guidance document. This fact was confirmed time and time again in Defendants' depositions of the State's witnesses. *See, e.g.*, Resp. to Facts, ¶ 6 (Ex. 8 (Strong Dep., p. 245) (testifying that he does not believe that an AWMP is a permission to apply a certain amount of phosphorus into the environment within the State of Oklahoma); Ex. 10 (Tolbert Dep., p. 222) (". . . I think there's no permit that's issued in the poultry context. So I don't know that you could say [land application of poultry waste in the IRW] is somehow expressly allowed"); Ex. 6 (Gunter Dep., p. 179) ("[A] plan is not rote, thou shalt do this, that shalt do this and you'll never have a problem. A plan is just exactly what it says. It's a plan. Here's guidelines. Here's things you need to take into consideration. . . ."); Ex. 7 (Parrish Dep., p. 152) ("These plans provide guidance of how they should use their poultry waste, and then there are other guidance they should also refer to besides these plans")).

Moreover, it was confirmed time and time again in Defendants' depositions of the State's witnesses that compliance with an AWMP does not necessarily equate to full compliance with the requirements of Oklahoma law regarding protecting the environment from runoff and pollution from poultry waste (although, of course, failure to comply with an AWMP would equate to a failure to comply with Oklahoma law). *See, e.g.*, Resp. to Facts, ¶ 6 & 7 (Ex. 8 (Strong Dep., pp. 211 & 220) (agreeing that a farmer can get a nutrient management plan and comply with that nutrient management plan and still be violating the law because there can be site-specific runoff from his application of poultry waste); *See* Ex. 11 (Littlefield Dep., p. 107) ("I wouldn't say that [following an AWMP] protects [the natural resources of the State]. I think that is a source is designed to protect. I -- I like the wording designed. I think that yes, it will help, but I don't think it's the whole -- the whole answer"); Ex. 6 (Gunter Dep., pp. 175-78 &

180-81) (testifying that compliance with an AWMP does not necessarily equate to compliance with the law); Ex. 7 (Parrish Dep., p. 140) ("There are more regulations than just the plan"); Ex. 7 (Parrish Dep., pp. 152-53) ("I can give you a whole list of things they have to -- in addition to [following the AWMP] that they have to adhere to . . .")).

And finally, AWMPs are not issued by the State or approved by the State. *Cf.* 2 Okla. Stat. § 10-9.7(C) (simply requiring that poultry feeding operations have an AWMP). AWMPs are written for the NRCS and the poultry grower. *See* Resp. to Facts, ¶ 6 & 7 (Ex. 6 (Gunter Dep., pp. 82-83)). While persons under contract with ODAFF do write some of the AWMPs pursuant to a federal grant, they are not being written by ODAFF, but rather "as though [ODAFF] were an NRCS field office." *See* Resp. to Facts, ¶ 6 & 7 (Ex. 6 (Gunter Dep., 81:11-82:16) Ex. ___ (Parrish Dep., pp. 64-66); *see also* Ex. 6 (Gunter Dep., pp. 243-244)).

Simply put, the dictates of Oklahoma law are clear and unequivocal: it is forbidden for land applied poultry waste to run off, to create an environmental or public health hazard, or to result in contamination of the waters of the State. *See* 2 Okla. Stat. § 10-9.7. Possession of an AWMP does not authorize, permit, or require a person to violate those dictates.[9 & 10]

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[9] Given that an AWMP is not a permit or authorization, Defendants' reliance on *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), is easily distinguished. *Carson Harbor* involved a discharge under National Pollutant Discharge Elimination System (NPDES) *permit*.

[10] Significantly, assuming arguendo that AWMPs were permits (which they are not), Defendants cannot establish that they are even being followed. Defendants' collection of deposition snippets from witnesses (most of whom have no regulatory oversight responsibilities) who *are not aware* of violations of law -- a far different proposition than testimony that Defendants and their contract growers are acting in compliance with the law -- proves nothing. *See, e.g.*, Resp. to Facts, ¶ 8 (Ex. 7 (Parrish Dep., pp. 14, 19, 199 & 258) (testifying that ODAFF "does not have enough people or budget to be able to determine [if all poultry operators are complying with their AWMPs]")). Defendants have no idea the circumstances under which poultry waste from their birds is land applied in the IRW. *See* Resp. to Facts, ¶ 8. Moreover, the fact of the matter is that poultry waste is running off and polluting the waters of the State -- *per se* evidence that poultry waste is not being applied consistent with the law. *See* Resp. to Facts, ¶

Defendants cite no provision of Arkansas law requiring land application of poultry waste in a manner that creates pollution. Indeed, Arkansas law plainly recognizes that improper utilization of poultry waste may result in the buildup of nutrients in the soil and cause those nutrients to enter waters within the state. *See* Ark. Code Ann. § 15-20-902(3). Arkansas has found that land application of poultry litter may have caused "excessive soil nutrient concentration" in areas of Arkansas and that it is therefore "necessary to limit the application of nutrients and to regulate the utilization of poultry litter" in order to protect these areas from "negative[] impact." *See* Ark. Code Ann. 15 § 15-20-1102. Arkansas recognizes the IRW as a "nutrient surplus area" for both phosphorus and nitrogen, *see* Ark. Code Ann. § 15-20-1104(a)(1), in which continued application of the nutrients to the soil could negatively impact the waters of the state. *See* Ark. Code Ann. § 15-20-1103(12).

Even were an AWMP a permit (which it is not), the law is clear that licensing by a state is not enough to avoid liability. *See, e.g., Union Oil Co. of California v. Heinsohn*, 43 F.3d 500, 504 (10th Cir. 1994) (gas plants releasing hydrogen sulfide permitted by environmental authorities still constituted nuisances); *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985) ("The fact that a person or corporation has authority to do certain acts does not give the right to do such acts in a way constituting unnecessary interference with the rights of others. A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance. The reasonableness or necessity of the acts complained of are for the jury to decide"). Put another way, the mere fact of regulation -- particularly given the fact that here the State prohibits runoff and contamination from poultry waste -- does not protect

8 (Ex. 20 (Water Quality in Oklahoma -- 2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16)).

Defendants from liability for their harmful waste disposal practices.[11]

Finally, the suggestion that the State has, through enactment of the Animal Feeding Act, consented to Defendants' trespass is absurd. As noted above, the purpose of the Act is designed to prevent pollution from poultry waste, not allow it. *See, e.g.*, 2 Okla. St. § 10-9.7(B)(4)(a) & (b) ("Poultry waste handling, treatment, management and removal shall: (a) not create an environmental or a public health hazard, (b) not result in the contamination of waters of the state . . ."); 2 Okla. St. § 10-9.7(B)(1) ("There shall be no discharge of poultry waste to the waters of the state"). Moreover, a host of other statutes emphasizes that the State does not consent to pollution of its waters, and indeed prohibits such pollution. *See, e.g.*, 27A Okla. Stat. § 2-6-105(A) ("It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state"); 27A Okla. Stat. § 2-6-102 ("Whereas the pollution of the waters of this State constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state . . . to provide that no waste or pollutant be discharged into any waters of the state or other placed in a location likely to affect such waters . . ."); 82 Okla. Stat. § 1084.1 ("Whereas the pollution of the waters of this state constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof . . .").

In sum, the facts are indisputable: Defendants' trespass is neither authorized nor consented to. Certainly no provision of Oklahoma or Arkansas law requires Defendants or their

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[11] Underscoring the point, Defendants' assertion that ODAFF has authorized their pollution-causing conduct runs directly into the presumption that administrative agencies act properly, and when decisions are inconsistent with legislative intent a court is not bound by them but instead is duty bound to effectuate the expressed legislative purpose. *See, e.g., Sharp v 251st St. Landfill, Inc.*, 810 P.2d 1270, 1275-76 (Okla. 1991) (DOH permit for landfill subject to injunction because it did not prevent pollution).

contractor growers to land apply waste. Therefore, Defendants' Motion for Summary Judgment on this point must be denied.

C. The State can establish the required elements of its unjust enrichment / restitution / disgorgement claim

1. Unjust enrichment allows recovery for expenses of proper waste disposal unjustly avoided by Defendants. No affirmative benefit need be conferred

In order to recover for unjust enrichment there must be enrichment to another coupled with a resulting injustice. *Teel v. Public Service Co. of Oklahoma,* 767 P.2d 391, 398 (Okla. 1998). Recovery for unjust enrichment is appropriate to recover unjust savings of an expense or loss. *County Line Inv. Co. v. Tinney,* 933 F.2d 1508, 1518 (10th Cir. 1991). In the environmental context, this includes recovering for unjust means of disposing of pollutants, which allows the polluter to save the expenses of otherwise collecting and disposing of the same, and thus enjoying a business profit, even when no benefit is directly conferred on the defendant. *See Branch v. Mobil Oil Corp.*, 778 F.Supp. 35, 35-36 (W.D. Okla. 1991). Unjust enrichment allows disgorgement of gains flowing from wrongdoing, in the form of the money saved by not complying with environmental laws and regulations. *See Branch v. Mobil Oil Corp.*, 788 F.Supp. 539, 540 (W.D. Okla. 1992).[12] Unjust enrichment based upon Defendants' costs saved by improper waste disposal techniques shifts the cost of pollution back to polluters who choose to subject their neighbors to pollution, and who often refuse to clean it up quickly. *See Unjust Enrichment in Environmental Litigation,* 20 J. Envtl. L. & Litig. 111, 112 (2006).

2. Defendants have been greatly enriched by avoiding the expenses of proper waste disposal

[12] Disgorgement is designed to deprive the wrongdoer of *all gains flowing from the wrong rather than to compensate the victim* and has a dimension of deterrence. *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 852 (Okla. 1987) (emphasis in original).

Dr. Robert Taylor demonstrates that between 1998 and 2008 Defendants have avoided costs from not transporting their waste out of the IRW in an amount ranging from $6.1 million to $107.2 million in 2008 dollars, depending on the tonnage which could have been economically moved. *See* Resp. to Fact, ¶ 9 (Ex. 21, (Taylor Dep. pp. 142-44, 177 and Dep.Ex. 2, Table 5.)) These costs do not duplicate the State's other damage claims. However, this is not *completely* an economic issue, as in equity and good conscience Defendants are responsible for their waste and their misconduct in disposing of it, whether or not they could have *profitably* disposed of their waste in a fashion that did not harm the waters of the Oklahoma portion of the IRW. The fact that Defendants had a profitable means of properly disposing of their waste only makes their failure to do so worse. But profitable or not, equity will hold Defendants responsible for their failure of proper waste disposal which unjustly enriched them and harmed the State of Oklahoma. The Court should hold Defendants responsible for the maximum possible costs they have saved by their improper waste disposal.

3. Defendants' actions were unjust

As the briefing on the present Motion shows, Defendants have designed a business model in which the waste produced by their birds is left with the growers for disposal under circumstances in which harm to the waters of the IRW is likely (if not inevitable). The State should not have to endure the pollution and degradation of its irreplaceable waters so that Defendants can save a fraction of a penny per pound of meat produced. Defendants' pollution of Oklahoma's waters for their own economic advantage is more than sufficient to provide the "resulting injustice" which justifies disgorgement of the enrichment they have enjoyed by avoiding proper waste disposal expenses. *Teel*, at 398.

4. Oklahoma has paid costs as a result of Defendants' unjust practices for which it can recover

Though not required to show Defendants' unjust conduct required it to make expenditures, the State of Oklahoma *has* incurred costs totaling at least $3.8 million as a result of Defendants improper waste disposal. These costs include, but are not limited to, expenses for hauling litter out of the IRW, projects intended to employ best management practices to mitigate the onslaught of phosphorus from Defendants' waste from the field to the water, and actions to respond to the release and threatened release of poultry waste in the IRW. *See* Resp. to Facts, ¶ 9.

5. The existence of other potential remedies does not require judgment dismissing the State's unjust enrichment claim.

Defendants simultaneously assert that *none* of the State's claims should go to trial, while offering as a basis for dismissal of the unjust enrichment claim that the State has other adequate remedies at law. *See* Motion, p. 23. Defendants cannot have it both ways. The Court should recall that Oklahoma law allows pleading alternative remedies and alternative theories of recovery, as long as plaintiffs are not given double recovery for the same injury. *N.C. Corff Partnership, Ltd. v. OXY USA, Inc.*, 929 P.2d 288, 295 (Okla.App. 1996). So does federal law. In *Board of County Commissioners of the County of La Plata, Colorado v. Brown Group Retail, Inc.*, 598 F.Supp.2d 1185, 1192-93 (D. Colo. 2009) the court denied a motion to dismiss an unjust enrichment claim on CERCLA preemption grounds, noting that "[e]ven if the recovery sought [under unjust enrichment] was identical [to that under CERCLA] . . . it is well established that a plaintiff may seek alternative theories of recovery, even when only one of those theories could actually bear fruit at trial. . . . [The Federal Rules and Tenth Circuit authority] allow[] a plaintiff to pursue alternative and legally inconsistent theories up until the point where one of the inconsistent theories prevails to the exclusion of the others." *See also* Fed. R. Civ. P. 8(d)(2).

The Court should postpone any decision about the need for restitution and/or disgorgement until the conclusion of the trial.

V. Conclusion

WHEREFORE, in light of the foregoing, "Defendants' Joint Motion for Summary Judgment on Counts 6 & 10 of the Second Amended Complaint [DKT #2055]" should be denied in its entirety.

Respectfully Submitted,

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I hereby certify that on this 2nd of June 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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